INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	9
Conclusion	11

TABLE OF AUTHORITIES

Cases:	
Oklahoma v. *Atkinson*, decided June 2, 1941 (No. 832, Oct. Term, 1940)	8, 10
Ryan v. *Chicago, B. & Q. R. Co.*, 59 F. (2d) 137	10
United States v. *Appalachian Power Co.*, 311 U. S. 377	3, 8
United States v. *Arizona*, 295 U. S. 174	10
United States v. *West Virginia Power Co.*, 91 F. 2d 611, petition for certiorari dismissed, 302 U. S. 770	7
Statutes:	
Act of January 21, 1927, sec. 1, 44 Stat. 1010	5
Act of May 15, 1928, sec. 10, 45 Stat. 534	5
Act of June 16, 1933, Title II, 48 Stat. 195 (40 U. S. C. secs. 401–414)	5
Act of April 8, 1935, 49 Stat. 115	6
Act of June 22, 1936, 49 Stat. 1570	2, 6, 10
Act of June 28, 1938, 52 Stat. 1215	2, 8, 10
Miscellaneous:	
Executive Order No. 7183–A	10
H. Doc. 91, 74th Cong., 1st sess.	3, 4, 5
H. Doc. 306, 74th Cong., 1st sess., pp. 4–5	5
H. Rep. No. 2353, 75th Cong., 3d sess., pp. 4–5, 6	7
Hearings before the Committee on Flood Control, House of Representatives, 75th Cong. (1937), pp. 345, 417–419 and (1938) pp. 154, 438, 461–463	7

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 685

WEST VIRGINIA POWER COMPANY, A CORPORATION, AND NORFOLK & WESTERN RAILWAY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote two opinions which are reported at 33 F. Supp. 756 and 39 F. Supp. 540, and printed in the record at pages 27–44 and 52–64. The opinion of the Circuit Court of Appeals (R. 68–80) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered September 17, 1941 (R. 81). The petition for a writ of cer-

tiorari was filed October 7, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the Executive Order of September 12, 1935, and the Flood Control Acts of June 22, 1936, and June 28, 1938, the execution of a definite agreement for the disposal of the electric power to be generated at the Bluestone Dam and Reservoir Project is a condition precedent to the condemnation of land for that project.

2. Whether the Bluestone Project, which involves the construction of a dam and reservoir on a navigable stretch of the New River in West Virginia for the purposes of flood control, protection and improvement of navigation, and generation of hydroelectric power, is constitutional.

STATUTES INVOLVED

The pertinent provisions of the Flood Control Acts of June 22, 1936, 49 Stat. 1570, 1572, 1586, and June 28, 1938, 52 Stat. 1215, 1217, are set forth in the Statement, pp. 6–7, 8, *infra*.

STATEMENT

The United States brought this proceeding to condemn lands for the Bluestone Dam and Reservoir Project which is to be constructed on the New River in West Virginia (R. 1–15). Petitioner West Virginia Power Company is the record

owner of the properties which the Government seeks to acquire, and petitioner Norfolk & Western Railway has a right-of-way through some of the tracts. The relevant facts are as follows:

1. *The Bluestone Dam and Reservoir.*—The New River rises in the Blue Ridge Mountains of northwestern North Carolina and flows north across Virginia and into West Virginia where it joins the Gauley River to form the Kanawha. The Kanawha continues northwesterly and empties into the Ohio River at Point Pleasant, West Virginia (H. Doc. 91, 74th Cong., 1st sess., pp. 1, 5, 10, 22, 23, 98). The site selected for the Bluestone Dam is three miles above Hinton, West Virginia (H. Doc. 91, p. 111). This Court recently held that the New River is navigable at that point. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 419.

The dam will be approximately 165 feet high and 2,000 feet long. The reservoir will occupy the valley of the New River for a distance of 36 miles and will have a total storage capacity of 609,400 acre feet. Of this, 236,000 acre feet will be reserved exclusively for flood control and the remainder will be divided between power storage and dead storage. A substantial portion of the 245,400 acre feet assigned to power storage could be made available for additional flood control by drawing down the level of the power pool when reports predict a flood of magnitude requiring increased storage space. Also, the discharge from

the power pool will provide a regulated stream flow in times of low water (H. Doc. 91, pp. 3, 7, 94, 100, 109–110, 111, 113, 115, 117; R. 22). The 128,000 acre feet of dead storage will provide a head for the generation of power and space for silt accumulation.

The project is designed to reduce below bankful stage all floods which have occurred since 1896. The Army engineers estimate that the *annual* benefits from flood protection will total $370,000.00, distributed as follows: $250,000.00 for the Kanawha and New River basins and $120,000.00 for the Ohio River Valley (H. Doc. 91, pp. 4, 8, 94, 106, 117–118, 119–120). And it is expected that in a year of average stream flow the project will generate over 400,000,000 kilowatt-hours of electricity (H. Doc. 91, pp. 3, 7–8, 94, 115–116, 119–120). The Board of Engineers for Rivers and Harbors has found that the sale of this energy will render the $13,000,000.00 project "self-liquidating" (H. Doc. 91, p. 9; cf. pp. 95, 119–120).

2. *Authorization of the project and prior litigation.*—The Bluestone Project was recommended by the Army Engineers and authorized by Congress as a part of a nation-wide plan of flood control. It represents the culmination of extended consideration of floods on the New River and the Kanawha, in connection with the larger problem of flood control on the Ohio and Mississippi Rivers.

Pursuant to the directions contained in the Acts of January 21, 1927, sec. 1, 44 Stat. 1010, 1015, and May 15, 1928, sec. 10, 45 Stat. 534, 538, the Secretary of War, on January 29, 1935, transmitted to Congress a report prepared by the Chief of Engineers which dealt with the New River and the Kanawha. This report, which was later printed as House Document 91, 74th Cong., 1st sess., recommended (p. 5):

> * * * the construction by the Federal Government of the Bluestone Reservoir project for the purposes of power development, flood control, and navigation in accordance with the general plans set forth in this report with such modifications as may be approved by the Chief of Engineers, at an estimated cost of $13,000,000, provided that definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest.

In August 1935 the Secretary of War submitted to Congress another report which contained a comprehensive plan for the control of floods on the Ohio River. The Bluestone Reservoir, which had previously been recommended in the report on the Kanawha, was also included as a part of that plan (H. Doc. 306, 74th Cong., 1st sess., pp. 4–5).

On September 12, 1935, the President, acting pursuant to Title II of the National Industrial

Recovery Act of June 16, 1933, 48 Stat. 195 (40 U. S. C., secs. 401–414), and the Emergency Relief Appropriation Act of April 8, 1935, 49 Stat. 115, issued Executive Order No. 7183–A which directed the Secretary of War "to proceed with the construction of [the] Bluestone Reservoir Project in accordance with the report of the Chief of Engineers to Congress and the plans and specifications submitted therewith * * *" (R. 72). By this same order the President allocated $800,000.00 for land acquisition and directed the Secretary of War "to proceed to acquire and clear * * * [the necessary] lands in anticipation of their use for such project" (R. 73).

Thereupon, proceedings were instituted to condemn the same lands as are involved in the present suit. The Power Company demurred on the ground that "the Acts relied upon as authority for the issuance of the Executive Order were * * * unconstitutional delegations of legislative power." (See pet. pp. 6–7.) Before the district court rendered a decision on this demurrer Congress passed the Flood Contral Act of June 22, 1936, 49 Stat. 1570, 1572, 1586, which provides—

> * * * the following works of improvement, for the benefit of navigation and the control of destructive flood waters and other purposes, are hereby adopted and authorized to be prosecuted * * * in accordance with the plans in the respec-

tive reports and records hereinafter designated:

* * * * *

Reservoir system for the reduction of Ohio River floods below Pittsburgh: Construction of reservoirs *including the completion of the Bluestone Reservoir now under way* * * *. [Italics supplied.]

In spite of this statute the district court sustained the demurrer (R. 34). The court of appeals reversed, holding that both the executive order and the 1936 Act furnished authority for the condemnation of the required land. *United States* v. *West Virginia Power Co.*, 91 F. (2d) 611, 613–614 (C. C. A. 4, 1937). Shortly thereafter, on October 26, 1937, the Secretary of War wrote to the Attorney General advising that funds to pay the awards were no longer available and requesting that the proceedings be dismissed. Before the dismissal could be effected the Power Company, on November 2, 1937, filed a petition for a writ of certiorari (R. 35). That petition was dismissed on motion of the Company's counsel when the Government indicated it would not prosecute the condemnation proceedings (302 U. S. 770–771).

After extended hearings [1] which disclosed the disposition of the first condemnation suit and re-

[1] Hearings before the Committee on Flood Control, House of Representatives, 75th Cong., June 7–11 and 15–18, 1937 (pp. 345, 417–419), and March 30 to April 19, 1938 (pp. 154, 438, 461–463). See also H. Rep. No. 2353, 75th Cong., 3d sess., May 13, 1938, p. 6.

vealed that work had been halted, Congress by the Flood Control Act of June 28, 1938, 52 Stat. 1215, 1217, again authorized the Bluestone project in the following language:

> * * * the provisions of Executive Order Numbered 7183A, dated September 12, 1935, are approved, and the acquisition at the cost of the United States of all lands, easements, and rights-of-way needed for the Bluestone Reservoir project are hereby authorized * * *

3. *The present suit.*—This suit was begun June 26, 1939 (R. 1). Petitioners filed separate identical demurrers (R. 45–47, 48) attacking the Government's amended petition for condemnation on the grounds that (1) the execution of an agreement for the disposal of the power is a condition precedent to the condemnation of land for the Bluestone project and (2) the purposes for which the land is sought to be acquired are in excess of the constitutional powers of the Federal Government. The district court, on authority of this Court's decisions in *Oklahoma* v. *Atkinson,* decided June 2, 1941 (No. 832, Oct. Term, 1940) and *United States* v. *Appalachian Power Co.,* 311 U. S. 377, overruled the second ground of the demurrers (R. 62). However, the court sustained the demurrers on the first ground (R. 62–64) and on July 1, 1941, entered an order dismissing the petition for condemnation (R. 49–52).

The Government appealed (R. 64–65) and, because of the importance of the Bluestone project from the viewpoint of national defense, asked that the case be set for argument at a special term (R. 66). This request was granted and on September 17, 1941, the circuit court of appeals reversed (R. 81). The opinion expressed the view (R. 80) "that the construction of this project * * * should not be further delayed, except to the extent necessary to afford the parties a full and fair hearing." Accordingly, it was provided that the mandate should issue in twenty days unless in the meantime petition for a writ of certiorari was filed (R. 80, 81). The petition was filed on the twentieth day and the mandate has been stayed (R. 81) pending action by this Court.

ARGUMENT

1. The court of appeals, noting that petitioners were insisting upon a point which had not even been raised in the prior litigation (R. 71), held that the Government may condemn land for the Bluestone project without first entering into an agreement for the disposal of the electric power which will be generated (R. 70–75). Contrary to petitioners' assertion (Pet. 9–10), this decision does not present a question of importance. The executive order and statutory authorizations here involved are not of general applicability but relate

solely to the Bluestone project. Consequently, no other project will be affected in any way.

Moreover, the decision that neither the President nor Congress adopted the condition as to disposal of power contained in the recommendation of the Chief of Engineers is plainly correct.[2] The Executive Order of September 12, 1935 (No. 7183–A), the Flood Control Act of June 22, 1936, 49 Stat. 1570, 1572, 1586, and the Flood Control Act of June 28, 1938, 52 Stat. 1215, 1217, expressly and unconditionally authorized the Bluestone project and directed the Secretary of War to proceed with the acquisition of the necessary lands. (See pp. 6–8, *supra*.)

2. On the authority of this Court's decision in *Oklahoma* v. *Atkinson* (No. 832, Oct. Term, 1940, decided June 2, 1941), which upheld the right of the United States to build the Denison dam on the Red River, both the district court (R. 62) and the court of appeals (R. 77–79) held that the Bluestone project is constitutional. The two projects, as the statement in this case (pp. 3–4, *supra*) and the opinion in the *Atkinson* case disclose, are similar in every material respect. Accordingly, there is no merit in petitioners' argument (pet. 24–33) that the Federal Government is acting in excess of its constitutional authority.

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[2] There is no basis for the suggestion (pet. 10, 19, 20–21) that the decision below is in conflict with *United States* v. *Arizona*, 295 U. S. 174, 189, or *Ryan* v. *Chicago, B. & Q. R. Co.*, 59 F. (2d) 137, 143 (C. C. A. 7).

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES H. FAHY,
Acting Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
CHARLES R. DENNY,
Attorney.

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